HEIRS OF SIMON PANEAK

IBLA 75-650 Decided June 25, 1981

Appeal from decision of Fairbanks District Office, Bureau of Land Management, rejecting Native allotment application F-028554.

Set aside and remanded.

1. Alaska: Native Allotments -- Geological Survey -- Hearings -- Mineral Lands: Determination of Character of -- Rules of Practice: Hearings

Where a Native allotment application filed in 1961 is rejected, more than 13 years after applicant has submitted acceptable evidence of his use and occupancy of the land for more than the required 5-year period set out in the appropriate statute, solely on the basis of a Geological Survey report in 1974 that the land was believed to be prospectively valuable for phosphate, the decision rejecting the application will be set aside and the matter remanded to BLM to proceed to issuance of patent as land must be considered to be nonmineral in character absent a showing that minerals are present in such quantities and such qualities as would induce a person of ordinary prudence to expend time and money with a reasonable prospect of success in developing a paying mine thereon.

APPEARANCES: Carmen Massey, Esq., Alaska Legal Services Corporation, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

The heirs of Simon Paneak 1/ appeal from a decision dated May 14, 1975, of the Fairbanks District Office, Bureau of Land Management (BLM), rejecting his Native allotment application F-028554 filed pursuant to the Act of May 17, 1906, 43 U.S.C. §§ 270-1 through 270-3 (1970), 2/ because the land included in the application is classified as prospectively valuable for phosphate deposits.

In his application for approximately 160 acres filed with BLM on October 19, 1961, Simon Paneak stated that he had resided on the land since 1948. Annually, he was on the land from April 21 through the following January 21. He resided on the allotment 9 months every year. Since 1948, he has kept 16 to 20 sled dogs on the land. Paneak listed the following improvements and their value: 1 cache at $50; 1 frame and sodhouse 16 by 22 feet at $500; 1 cellar at $200; 1 frame and sodhouse 12 by 25 feet at $400. The land is used for fishing, trapping, hunting, and berrypicking during the appropriate seasons, during periods of actual occupancy, and at other times.

On December 20, 1961, the Geological Survey (Survey) reported that this land was without value for minerals, either metalliferous or nonmetalliferous.

In his report, Jerry C. Wickstrom, a BLM realty specialist, stated that a field examination of the land had been conducted on March 20, 1964. The remains of two sod and frame dwellings were found. A frame structure of poles, box boards, and caribou hides, claimed by Paneak, was located off the described lands approximately 1/4 mile from the sodhouse remains. 3/

---

1/ The record does not show the date of the demise of Simon Paneak.

2/ This Act was repealed on Dec. 18, 1971, by the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1628 (1976), subject to applications pending on that date. 43 U.S.C. § 1617 (1976).

3/ The location of the frame house is not clear. Realty Specialist Wickstrom noted that the land description does not include the land on which the frame cabin is situated or the land abutting the outflow of Tulugak Lake where Paneak fished. Wickstrom indicated that the application should be amended to include the land desired by Paneak. On Aug. 25, 1972, Elliott Lowe, another BLM realty specialist, made another field examination of the property and discovered that the original description was adequate to satisfy Paneak's needs including the situs of the cabin and abutment on the lake. He concluded that the original description being correct, no amendment was necessary. A memorandum of Apr. 2, 1974, from the Arctic-Kobuk area manager to the Chief, Division of Lands, indicated that if it be necessary that the frame house actually lay on the site, a minor change in description could do this.

Wickstrom concluded that Paneak had used and occupied the land in the past and still has part of the improvements claimed located on the land and is entitled to an allotment covering the parcel. His report was approved by the Assistant Manager of the BLM Lands Branch, Fairbanks, District, on October 6, 1965.

However, action on the case was suspended September 14, 1965, because Departmental policy changes required that Paneak be given the option to amend his application to include additional tracts of land. This requirement was met, and on November 29, 1965, Paneak informed BLM that he did not intend to request additional tracts of land and requested that his application be processed. Satisfactory final proof that he had complied with the requirements of the Act was received on the same day.

Another field report was prepared by Realty Specialist Elliott Lowe on March 30, 1973. Lowe reported that Paneak appeared to have complied with the requirements of the Native Allotment Act, and recommended that he be granted the allotment as described in the report.

Survey again reported on April 24, 1973, that the land was not valuable for minerals, either metalliferous or nonmetalliferous. 4/

On April 15, 1974, for the first time, Survey informed BLM that the parcel in question was considered valuable for phosphate. On November 20, 1974, BLM requested a supplemental report of mineral and water resources for the parcel. Survey responded on November 25, 1974, that the land is valuable for phosphates. On November 26, 1974, Survey clarified its position stating that the general area surrounding the allotment was considered only prospectively valuable for phosphate, but not suitable to be classified "valuable for phosphate." The geologist explained that this classification, prospectively valuable for phosphate, is used for other so-called phosphate areas in Alaska, and that it should have been applied to F-028554 in their report dated December 30, 1961, because it is based on field studies made in 1960, during which rock samples containing more than 21 percent phosphorous pentoxide were taken from near this allotment. Phosphate rock with this content of phosphorous pentoxide approaches "furnace grade" and is sufficient evidence to justify the classification prospectively valuable for phosphate.

---

4/ On Apr. 2, 1974, the Arctic-Kobuk area manager wrote a memorandum to the Chief, Division of Land Office, in which he recommended equitable adjudication of Paneak's case on the following grounds:

"The delays in survey of this parcel since the first field report, was generally beyond the control of the applicant. Two field reports confirm the substantial use of this parcel * * * at least for 120 acres and the applicant has been waiting 13 years since he applied and 9 years since the parcel was first examined for patent.

"It is therefore recommended that this parcel be surveyed and patented for the 160 acres applied for."

BLM rejected the application on May 14, 1975, on the basis of 43 CFR 2561.0-3, which provides:

> The Act of May 17, 1906 (34 Stat. 197), as amended August 2, 1956 (70 Stat. 954; 48 U.S.C. 357, 357a, 357b), authorizes the Secretary of the Interior to allot not to exceed 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska or, subject to the provisions of the Act of March 8, 1922 (42 Stat. 415; 48 U.S.C. 376-377), of vacant, unappropriated and unreserved public land in Alaska that may be valuable for coal, oil, or gas deposits * * * to any Indian, Aleut or Eskimo of full or mixed blood who resides in and is a Native of Alaska, and who is the head of a family, or is twenty-one years of age. [Emphasis added.]

BLM determined that land that is valuable or prospectively valuable for any mineral is mineral in character within the meaning of the Native Allotment Act and, therefore, may not be allotted.

BLM concluded its decision by offering Paneak the following options:

> (1) File a request with this office for reclassification of the land as nonmineral. The request for reclassification must be accompanied by competent geologic or other technical data to support the contention that the lands are nonmineral. If the land is not reclassified as nonmineral, application for a hearing may be requested by Mr. Paneak within 30 days from his receipt of such notification. If a hearing is ordered, the burden of proof will be upon Simon Paneak.
>
> (2) Appeal this Decision. [Emphasis added.]

Paneak chose the latter, but, in their statement of reasons, his heirs argued that BLM did not afford him an adequate opportunity for review of its decision as to the character of the land. Appellants based this contention on the fact that the decision allowed Paneak to either file a request for reclassification or appeal his decision. This was interpreted to mean that if he had applied for reclassification, he would have forfeited his right to appeal. Appellants added that the requirement that a request for reclassification had to be accompanied by competent geologic or other technical data that the lands are nonmineral put an impossible burden on Paneak who was an uneducated subsistence hunter and fisherman.

Actually, Paneak would not have been deprived of the right to appeal had he chosen to file a request for reclassification. If the land had not been reclassified, he could have requested a hearing. Any decision rendered by the Administrative Law Judge as a result of that hearing could have been appealed to this Board. 43 CFR 4.410.

Appellants allege that prospective value for phosphate is not a valid criterion for classifying the lands as mineral. Appellants submit that they should now be granted a hearing at which their representative could present evidence as to the nonmineral character of the land.

The record is abundantly clear that Paneak was a qualified applicant for a Native allotment, and that his claim to an allotment had been perfected at the time his application was filed with BLM in 1961. All field reports thereafter made by BLM inspectors in this case support this conclusion. Contemporaneously, on December 20, 1961, Survey reported the land as being without value for any mineral, metalliferous or nonmetalliferous. Thereafter, it was confusion within BLM which delayed further action on this Native allotment application.

It is axiomatic that the Department may inquire into the propriety of conveying public land under its jurisdiction, in response to a proper application, at any time prior to the issuance of a land patent. Wilfred S. Wood, 20 IBLA 284 (1975). See also United States v. Shearman, 73 I.D. 386, 434 (1966), aff'd sub nom. Reed v. Morton, 480 F.2d 634 (9th Cir.), cert. denied, 414 U.S. 1064 (1973); Knight v. United States Land Ass'n., 142 U.S. 161, 178 (1891). But in State of Wisconsin, 65 I.D. 265 (1958), the Department placed certain limitations on this inquiry when it stated at 272:

> Where one has done all that is required of him under a particular statute and has earned equitable title to a tract of public land, nonetheless so long as legal title remains in the United States, the Secretary retains jurisdiction to inquire into the validity of disposing of the land to that person. The Secretary, however, can vacate the disposal and refuse to issue patent only for proper grounds existing prior to or up to the time equitable title was earned. Thus, if only nonmineral land can be disposed of under a particular statute and an applicant is permitted to earn equitable title to a tract of land on a determination or assumption that the land is nonmineral in character, the disposal of the land can be vitiated only on a subsequent determination that the original finding of nonmineral character was in error and that facts in existence at the time equitable title passed required a determination that the land was mineral in character.

> In the cases where a disposal can validly be set aside, despite the passage of equitable title, due process permits such action to be taken only after proper notice and hearing.

The regulations implementing the Act of July 17, 1914, as amended, 30 U.S.C. §§ 121-123 (1976), 5/ provide, at 43 CFR 2093.3-3(c)(2), as follows:

> (2) In a case where acceptable final proof has been submitted, or a claim has been perfected, and the Geological Survey thereafter makes report, as in the above or similar form, such report will not be relied upon as basis for a mineral reservation unless the Government is prepared to assume the burden of proving, prima facie, that the land was known to be of mineral character, at the date of acceptable final proof or when the claim was completed, according to the established criteria for determining mineral from nonmineral lands, among which may be those recognized by the Supreme Court in the case of United States v. Southern Pacific Company et al. (251 U.S. 1, 64 L. ed. 97). If the Government is thus prepared to assume such burden of proof, the Bureau of Land Management will notify the entryman of the mineral classification and that a hearing will be ordered if he manifests disagreement with the classification within a reasonable period. The entryman or claimant will be advised that in the event hearing is had, the burden of proof will be upon the Government; also that, if he shall fail to make answer within the time allowed, the entry or claim and any patent issued pursuant thereto will be impressed with a reservation of oil or gas to the United States.

The Native Allotment Act, 43 U.S.C. § 270-1 (1970), provided that allotments could be made only on vacant, unappropriated, and unreserved nonmineral land in Alaska. Nonmineral land has been defined as such lands as are not known to contain any substance recognized and classed

---

5/ The Act of July 17, 1914, as amended, 30 U.S.C. §§ 121-123 (1976), authorizes the appropriation, location, selection, entry or purchase under the nonmineral land laws of the United States, if otherwise available, of lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic mineral lands. 43 CFR 2093.3-2 provides: "The Act of July 17, 1914, is general and comprehensive and operates in all the States containing public lands of the character specified. It does not apply to lands in the State of Alaska * * *." We do not know the reason for this apparent contradiction in the regulations.

by standard authorities as mineral, in such quantities and of such qualities as would, with reasonable prospects of success in developing a paying mine thereon, induce a person of ordinary prudence to expend the time and money necessary to such development. Circular 851, 51 I.D. 365 (1926). The file contains no evidence, and this Board does not believe in the absence of such evidence, that the very remote area in question will justify such mining development anytime in the foreseeable future.

As was held by the Assistant Secretary in John M. DeBevoise, 67 I.D. 177 (1960), where land is shown to contain minerals in such limited quantities that their extraction would not justify the cost thereof, the land is not mineral in character so as to remove it from operation of the nonmineral land laws. See also State of California v. Rodeffer, 75 I.D. 176 (1968); United States v. Bullington (On Rehearing), 51 L.D. 604 (1926); Harkrader v. Goldstein, 31 L.D. 87, 94-96 (1901); Walker v. So. Pac. R.R., 24 L.D. 172 (1897).

[1] In the circumstances of the cited regulation, we find it is proper to vacate the BLM decision on appeal and to remand the case to BLM for whatever further processing may be required for the issuance of patent to the heirs of the applicant, Simon Paneak. See section 905, Alaska National Interest Lands Conservation Act. 43 U.S.C. § 1634 (Supp. III 1976).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision on appeal is set aside and the case remanded for further appropriate action consistent herewith.

Douglas E. Henriques
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Gail M. Frazier
Administrative Judge